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IN THE
COURT OF APPEALS OF INDIANA

AMERICAN CONSULTING ENVIRONMENTAL SAFETY SERVICES, INC.,	)	
Appellant,	)	
vs.	)	No. 71A05-0707-CV-409
LYNETTE SCHUCK,	)	
Appellee.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable David Chapleau, Judge
Cause No. 71D06-0601-PL-29

June 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

American Consulting Environmental Safety Services, Inc. (American Consulting) appeals from the trial court's judgment in favor of Lynette Schuck and against American Consulting on American Consulting's claim for damages. On appeal, American Consulting presents one issue: Did the trial court err in concluding that Section 12 of an employment contract between American Consulting and Schuck constituted an unenforceable penalty rather than a valid provision for liquidated damages?

We affirm.

American Consulting is an Indiana corporation that provides safety compliance services and materials to customers located within a 200-mile radius of South Bend, Indiana. To carry out its purpose, American Consulting evaluates the safety and accident prevention policies of businesses and offers programs and courses to bring them into compliance with regulatory agencies' requirements. On January 14, 2005, Schuck was hired by American Consulting as a safety instructor. Schuck signed an employment agreement setting forth the terms and conditions of her employment. Although Schuck had received training in occupational safety and health prior to coming to work for American Consulting, American Consulting required that Schuck undergo additional training. Specifically, Section 12 of the employment agreement provided:

> The Company requires its Employees to be properly trained in safety compliance and state and federal OSHA and EPA standards and the sales, marketing, and other functions of its business. Accordingly, the Company requires each Employee to undergo this training during the initial 180 day probationary period of employment for set [sic] Employee. This training shall cost the Employee the sum of $3,000.00. Set [sic] sum shall be initially due at the first session of training, or when training materials are provided to the Employee, whichever comes first.

> However, the Company agrees to pay the cost of this training on the Employees [sic] behalf, but subject to reimbursement by the Employee within the first 12 calendar months of employment. If the Employee remains employed by the Company for 12 continuous calendar months from the first date of hire, the Employee shall not be obligated to reimburse the Company for the cost of training. If, however, the Employee shall voluntarily terminate the employment or if the Employee is terminated by the Employer for good cause, the Employee shall reimburse the Company for the cost of training in accordance with the following schedule:
>
> If Employee terminates employment during the first 0 to 3 months after date of hire, the Employee shall owe the Company $3,000.00.
>
> If the Employee terminates employment during the 4 to 6 months after date of hire, the Employee shall owe the Company $2,160.00.
>
> If the Employee terminates the employment during the 7 to 9 months after date of hire, the Employee shall owe the Company $1,500.00.
>
> If the Employee terminates employment during the 9 to 12 months after the date of hire, the Employee shall owe the Company $750.00.
>
> Any amounts owed by the Employee under this provision shall be deemed a debt to the Company and this contract shall serve as a promissory note. Said amounts owed under this Contract shall become due and payable on the Employees [sic] last day of work. All amounts unpaid from the last day of work on shall accrue interest at the rate of 12 percent per annum.

Appendix at 22.

Schuck's training by American Consulting consisted of spending one day watching videos and taking several short quizzes. The videos were part of a video library American Consulting had accumulated over the course of several years. Additional training included Schuck shadowing another American Consulting employee during visits to existing customers. In total, Schuck completed twelve and one-half days of

"shadow training". *Transcript* at 64. During the training period, Schuck was paid $9.00 per hour and was not paid overtime.

In June 2005, Schuck informed American Consulting that she had been experiencing medical problems and had found out that she was pregnant. After five months of productive employment, Schuck felt it necessary, due to her pregnancy, to resign from her position because she did not believe that she could perform her job responsibilities, especially because of the nature of the job and the amount of traveling required.

On September 30, 2005, American Consulting filed a notice of claim against Schuck in the St. Joseph Superior Court, Small Claims Division seeking judgment in the amount of $1,500.00.[1] American Consulting maintained that Schuck breached the terms of her employment agreement by failing to pay back a portion of her training expense pursuant to Section 12 upon her termination of her employment. On January 18, 2006, Schuck moved to transfer the action to the St. Joseph Superior Court's plenary docket. On that same date, Schuck also filed a counterclaim seeking a declaratory judgment that the employment agreement was invalid and seeking damages from American Consulting on grounds that Schuck's assent to the employment agreement was procured by fraud.

Following a bench trial held March 12, 2007, the trial court entered its findings of fact and conclusions of law: Specifically, the trial court made the following findings pertinent to our review:

[1] Although Schuck had worked for American Consulting for only five months, American Consulting claimed only $1,500.00 rather than $2,160.00 called for in the reimbursement schedule set out in Section 12 for termination of employment within four to six months.

7. Defendant credibly testified that all of the video training occurred on the same day and the quizzes were very brief. In addition, defendant watched other videos on her own time outside of the hours of employment or place of employment of the defendant. Defendant was paid $9.00 per hour during her training sessions. The shadow training lasted approximately 12 days.

* * *

13. In considering the facts of this case, the only credible evidence submitted as to the actual loss of the plaintiff is the wages paid to defendant during her training. Defendant testified that her hourly wage was $9.00 per hour and that she had one day of training by watching video tapes that were previously purchased for other employees, and plaintiff credibly testified that there were 12 days of shadow training by following an experienced employee while that employee was actually earning money for the plaintiff while training employees of customer corporations. Assuming 13 days at 8 hours per day at $9.00 per hour equals $72.00 per day times 13 days equals $936.00. However, the plaintiff's schedule as found in Paragraph 12, provided that because the defendant had already worked six [sic] months at the time of her pregnancy-related request to leave employment, only one-half of that sum would be due, under the intent of the parties. The maximum damages that plaintiff could recover under the actual evidence would be $468.00, assuming that this provision is enforceable. Four Hundred Sixty-Eight Dollars ($468.00) is approximately thirty-one (31%) percent of the amount claimed by the plaintiff.

* * *

15. The lack of reasonableness of the stipulation for repayment of training costs under the circumstances of this case weighs in favor of finding that this is a penalty clause and is unenforceable.

16. This court finds that Paragraph 12 of the employment contract contains a penalty provision which is unenforceable.

Appendix at 5-7. The trial court thus entered judgment in favor of Schuck and against American Consulting on American Consulting's claim.[2]

American Consulting argues that the trial court erred in failing to enforce the employment agreement according to its clear and unambiguous terms. Specifically, Schuck contends that Section 12 of the employment agreement is a valid liquidated damages provision, not an unenforceable penalty as determined by the trial court. American Consulting maintains that the liquidated damages sought ($1,500.00) are not grossly disproportional to the loss found by the trial court.

The term "liquidated damages" applies to a specific sum of money that has been expressly stipulated by the parties to a contract as to the amount of damages to be recovered by either party in the event of a breach of the contract by the other. *Rogers v. Lockard*, 767 N.E.2d 982 (Ind. Ct. App. 2002). Liquidated damages provisions are useful and generally enforceable in situations where actual damages would be uncertain or difficult to ascertain. *Id*. To be enforceable, the sum stipulated as liquidated damages must "fairly be allowed as compensation for the breach." *Olcott Int'l & Co., Inc. v. Micro Data Base Sys., Inc.*, 793 N.E.2d 1063, 1077 (Ind. Ct. App. 2003), *trans. denied*. Where the stipulated sum is grossly disproportionate to the loss that may result from a breach of contract, we should treat the sum as a penalty rather than as liquidated damages. *Olcott Int'l & Co., Inc. v. Micro Data Base Sys., Inc.*, 793 N.E.2d 1063.

As our Supreme Court has noted with regard to the history of litigation of liquidated damage clauses, in cases where actual damages could be readily ascertained

[2] The trial court's judgment makes no mention of Schuck's counterclaim.

and the amount stipulated exceeded the actual damages, then the contract provision has been treated as a "penalty" and only actual damages awarded. *Time Warner Ent'mt Co., L.P. v. Whiteman*, 802 N.E.2d 886, 893 (Ind. 2004). "The distinction between a penalty provision and a liquidated damages provision is that a penalty is imposed to secure performance of the contract, and liquidated damages are to be paid in lieu of performance." *Rogers v. Lockard*, 767 N.E.2d at 991.

In determining whether a stipulated sum payable on a breach of contract constitutes liquidated damages or a penalty, we will consider the facts, the intention of the parties, and the reasonableness of the stipulation under the circumstances of the case. *Olcott Int'l & Co., Inc. v. Micro Data Base Sys., Inc.*, 793 N.E.2d 1063 (*citing Gershin v. Demming*, 685 N.E.2d 1125 (Ind. Ct. App. 1997)). Where there is uncertainty as to the meaning of a liquidated damages provision, classification as a penalty is favored. *Id*. The question of whether a liquidated damages clause is valid or whether it constitutes an unenforceable penalty is a pure question of law for the court. Thus, our review of the trial court's determination in this regard is de novo. *Fraley v. Minger*, 829 N.E.2d 476 (Ind. 2005).

Here, Schuck's training consisted of watching videos accumulated over the years by American Consulting. These videos were also used to train other employees. Schuck also shadowed an American Consulting employee for twelve days. American Consulting did not send Schuck for specialized off-site training, seminars, or the like, or bring in specialists to provide on-site training. American Consulting failed to explain how the training it did provide amounted to its stated cost of $3,000.00. American Consulting

also failed to demonstrate a reasonable relationship between the reimbursement amounts listed in the Section 12 schedule and the amount of actual damages incurred by the termination of employment.

To be sure, the primary damages American Consulting suffered (if indeed any damages at all) would have been the wage paid to Schuck during her training. This is precisely what the trial court used to compute American Consulting's damages. The trial court calculated Schuck's wage for thirteen days of training at a rate of $9.00 per hour for an eight-hour day and concluded that, at most, American Consulting's loss was $468.00, or thirty-one percent of American Consulting's claimed amount. American Consulting's claimed damages of $1,500.00 is not commensurate with or reasonably related to its actual damages. Furthermore, upon reading the contract, the purpose of Section 12 appears to be to secure performance of the contract for at least a twelve-month period, an earmark of a penalty provision. Based on the foregoing, we can only conclude that Section 12 amounts to an unenforceable penalty.

Judgment affirmed.

KIRSCH, J., and BAILEY, J., concur.